PARTIES:	ROZYCKI, Malgorzata
	v
	WORK SOCIAL CLUB KATHERINE INC.
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No 56 of 1996
DELIVERED:	Darwin, 5 February 1997
HEARING DATES:	2 August 1996
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Workers' Compensation - Proceedings to obtain compensation - Determination of claims - Appeals and stated cases - Other matters - Northern Territory - Use by Courts of words and phrases precisely as employed in legislation recommended when making findings which may be subject of review - Opportunity of parties to have published reasons clarified by Magistrate prior to taking out of formal award or order.

Work Health Court Rules (NT), r31

Crestwood Phoenix Darwin Pty Ltd and The Nominal Insurer v Savasti Kamarakis, unreported Northern Territory Court of Appeal, 23 December 1996, followed.
Salvatore Lapa (No. 2) (1995) 80 A Crim R 398, referred to.

Workers' Compensation - Assessment and amount of compensation - Amount of compensation during incapacity - Whether failure to make any finding as to degree of partial incapacity for work despite earlier finding of partial incapacity - Finding as to amount appellant was

from time to time reasonably capable of earning in a week within meaning of s65(2)(b) Work Health Act was implicitly made - Width of Court's power in s116(2) to vary decision or determination appealed against.

Work Health Act 1994 (NT), s49(a), s64(1), s65, s68, s116(2)

The Queen v Tonkin & Another; Ex parte Federated Ship Painters' & Dockers' Union of Australia (1954) 92 CLR 526, at 528, referred to.
The Queen v Industrial Court; Ex parte Mount Gunston Mines Pty Ltd (1982) 30 SASR 504, at 512.

Workers' Compensation - Assessment and amount of compensation - Weekly earnings - Northern Territory - Amount of "normal weekly earnings" for purposes of s64(1) Work Health Act - Earnings of appellant from engagement with last employer comprise normal weekly earnings - Date on which appellant "first became entitled to compensation" within meaning of s65(3) - "Compensation" as used in ss64 & 65 is related to compensation payable under those provisions and not otherwise - Material factor in determining amount of compensation under subdiv(B), Div3, Part V is not the accident or nature or extent of the injury but the incapacity to earn wages occasioned by the injury - Provisions in definition of "normal weekly earnings" in s49 are self-contained and have no application to other definitions nor any effect upon interpretation of "compensation" in s65(3).

Work Health Act 1994 (NT), s49(a), s53, s64(1), s65, s68, s116(2)

Loizos v Carlton and United Breweries Ltd (1993-94) 94 NTR 31, considered.

Workers' Compensation - Proceedings to obtain compensation - Determination of claims - Evidence and onus of proof - Failure of appellant to give evidence upon resumed hearing - Construction of work health legislation most favourable to worker should be adopted where ambiguity or difficulty arise.

Work Health Act 1994 (NT)

Crestwood Phoenix Darwin Pty Ltd and The Nominal Insurer v Savasti Kamarakis, unreported Northern Territory Court of Appeal, 23 December 1996, followed.
Foresight Pty Ltd (trading as Bridgestone Tyre Services) v Maddick (1991) 79 NTR 17, at 24, considered.

Loizos v Carlton and United Breweries Ltd (1993-94) 94 NTR 31, considered.

REPRESENTATION:

Counsel:

Appellant:	Mr J B Waters
Respondent:	Mr S R Southwood

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Ward Keller

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 56 of 1996

BETWEEN:

MALGORZATA ROZYCKI
Appellant

AND:

WORK SOCIAL CLUB KATHERINE INC.
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 February 1997)

This appeal is from a decision of the Work Health Court ("the Court") concerning the appellant's entitlements to weekly compensation under the provisions of ss64 and 65 of the *Work Health Act* 1994 (NT) ("the Act"). The principal issues concern the Court's alleged failure to make essential findings, the interpretation of subs(3) of s65 and related matters going to onus of proof. All are questions of law.

Background

The proceedings before the Work Health Court were in two stages. In the course of his reasons for decision of 20 March 1995, the learned Stipendiary Magistrate Mr Hannan SM made the following findings which also provide a convenient framework for the chronology of events:

1. The appellant commenced her employment with the respondent in March 1989. In broad terms she worked as a cleaner at the respondent's Katherine premises, washing floors, throwing away rubbish, collecting and cleaning glasses, dusting and cleaning tables and washing windows. The work was performed early in the mornings and occupied two or three hours a day on weekdays, and three or four hours a day at weekends. In her claim she stated that she worked 14 hours per week. For that she was paid $180 per week.

2. On 3 June 1989 she was mopping the floor, lifted a bucket of water and felt a strange pain in her lower back.

3. She continued her employment, but terminated it on 1 February 1990, at which time it appears she had arranged for her husband to take over her duties, but she assisted him.

4. Between 30 May 1990 and 27 February 1992 she engaged in various cleaning and associated jobs with employers in and about Katherine. It seems that at the peak she was earning $380 per week when engaged with

the Defence Forces at the Tindal RAAF Base and she was last employed by Sterling Private Cleaning Service at $250 per week after tax. During the whole of this period she had continued pain in her back. The number of hours worked at the RAAF were between 7.30am and 4.30pm Monday to Thursday, and on Fridays 7.30am to 1.30pm. At Sterling Private Cleaning Service she worked five hours a day for five days per week.

5. On 22 February 1992 she went to Adelaide to live . She was first seen there by Dr Kreminski in April. From 21 July 1992 to 9 October 1992 she was at the Alfreda Rehabilitation Centre to which she had been recommended by that doctor.

6. From March until August 1993 she entered into a training programme at the Hyatt Hotel paid by the Commonwealth Rehabilitation Centre. She took up the engagement as an assistant in the kitchen, in particular, preparing cakes, cutting fruit and preparation of desserts and cleaning up. After completing the skills which she had gone to the hotel to obtain, and having achieved "a high level of capacity as a pastry hand" the work experience and training programme was terminated. She worked there from between three hours up to six hours per day.

7. The appellant had been on Social Security benefits from that time.

His Worship found that during the period from February to March 1992, when she saw the doctor, she was unemployed, but that that was not brought

about by any incapacity for work. She was actively looking for work and conditions of the labour market were the predominant cause of her lack of success. His Worship accepted that she had suffered an injury, but that her employment after the event was indicative of a determination to triumph over the consequences. At p27 of his reasons (135 of the Appeal Book) his Worship said:

> "It would seem plain that an applicant with a disability but with the applicant's stoicism and determination can postpone the employer's responsibility to pay compensation for a compensable disability by exhibiting that determination and stoicism and continuing to work. The applicant employee by doing so may place obstacles in her way as far as proving the disability and her incapacity is concerned, as of course occurred in this case, but there is no bar to the responsibility of the employer arising at a later date. The example of the employer who continues to employ the disabled employee on such terms that he suffers no financial loss but eventually has to terminate his services will suffice to indicate that an employer's responsibility to compensate an employee can arise at a later date.
>
> Alternatively an employee with a disability may obtain employment and suffer no economic loss and lose that employment and, once again, experience economic loss, only to yet again, despite disability, obtain lucrative employment. The choice of the applicant who may have been employed and unemployed as in the example, to stop seeking work and claim compensation may seem opportunistic, but that appellation does not prevent the applicant exercising that option."

Having rejected that part of the claim for weekly compensation, his Worship considered the claim for the period from 27 February 1991 (sic - 1992) to the date of his judgment, and as to that he said: "... I am satisfied that opportunistic though it may have been her disabilities were not the cause of her unemployment". It is tolerably clear that the word "not" was included in error. Note the earlier context in which the word "opportunistic" is used. His

Worship found that she suffered a partial disability (a phrase which he uses interchangeably with "partial incapacity" in his reasons). His Worship was troubled, however, as to the degree of that disability because he found that it was less than the appellant would have the Court believe. He expressed himself satisfied that "the applicant bore the onus of proving the partial disability (sic) and has done so", and at the conclusion of his reasons said: "The question of the level of compensation remains to be argued as well as consequential orders". Argument about a level of compensation would not have arisen in the context of this case had not his Worship been satisfied that the applicant had been partially incapacitated for work as a result of the injury.

It has not presented any great problem in this case, but it would lead to a significant improvement in the understanding of reasons in cases such as this if practitioners and the Courts would use the words and phrases precisely as employed in the legislation, especially when making findings which may be the subject of review. In *Crestwood Phoenix Darwin Pty Ltd and The Nominal Insurer v Savasti Kamarakis* (unreported Northern Territory Court of Appeal, 23 December 1996) attention was drawn to the opportunity which parties have to go back before a Magistrate when reasons have been published which require clarification, provided that is done before the formal award or order of the Court is taken out (see for example *Salvatore Lapa (No. 2)* (1995) 80 A Crim R 398). The work of this Court and the Court of Appeal may be

unnecessarily burdened on appeal by questions involving whether or not a Magistrate has made a particular finding, or where unclear or ambiguous language is used, if the parties do not go to the Magistrate directly in the first place to attend to the matter. The material placed before this Court does not disclose that any decision of the Court was settled by the Registrar and signed by the Magistrate as envisaged by r31 of the Work Health Court Rules. I strongly suggest that whenever a decision is made, the parties seek to attend upon the Registrar or Magistrate when the same is being settled, so that problems such as arose in the Kamarakis case and this, may be obviated.

Compensation for Incapacity for Work

The principal provisions relating to compensation for incapacity are these:

> "64. COMPENSATION DURING FIRST 26 WEEKS OF INCAPACITY
>
> (1) Subject to section 66, a worker who is totally or partially incapacitated for work as the result of an injury shall be paid, in addition to any other compensation to which under this Part he is entitled, compensation equal to the difference between what he actually earned in employment during a week and his normal weekly earnings, in respect of any period during which the total period, or aggregate of the periods, of his total or partial incapacity, as the case may be, arising out of or materially contributed to by the same injury does not exceed 26 weeks.
>
> ....
>
> 65. LONG TERM INCAPACITY
>
> (1) Subject to this Part, a worker who is totally or partially incapacitated for work as the result of an injury out of which his incapacity arose or which materially contributed to it shall be paid, in addition to any other compensation to which under this Part he is entitled, after the first 26

weeks referred to in section 64, compensation equal to 75% of his loss of earning capacity or 150% of average weekly earnings at the time the payment is made, whichever is the lesser amount, until -

(a) he attains the age of 65 years; or

(b) if the normal retiring age for workers in the industry or occupation in which he was employed at the time of the injury is more than 65 years - he attains that normal retiring age.

(2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between -

(a) his normal weekly earnings indexed in accordance with subsection (3); and

(b) the amount, if any, he is from time to time reasonably capable of earning in a week during normal working hours in work he is capable of undertaking if he were to engage in the most profitable employment, if any, reasonably available to him."

In assessing what is the most profitable employment available to a worker regard is to be had to a number of matters detailed in s68.

For these purposes "normal weekly earnings", in relation to a worker, means -

"(a) subject to paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his ordinary time rate of pay;". (s49(1))

Assessing the level of compensation

When the adjourned hearing commenced, the position was that the appellant had a finding in her favour that she had been partially incapacitated

for work as a result of an injury arising out of or in the course of her employment with the respondent. That partial incapacity did not arise until about three years after the incident on 3 June 1989. She had continued employment in circumstances described by his Worship thereafter until 27 February 1992, and apart from the time she spent at the Hyatt hotel she had not been employed since. His Worship was satisfied that she was partially incapacitated for work in circumstances in which she was entitled to weekly compensation under ss64 and 65 of the Act, but on the evidence then before him, was unable to make findings as to the "level of compensation".

The hearing resumed before the Court on 1 September 1995. Evidence was received from Dr Kreminski for the appellant and Dr Schaeffer for the respondent. Counsel for the parties agreed that medical expenses arising from the injury amounted to $9,452.31. Counsel for the respondent tendered the appellant's answer to interrogatories disclosing that she had attended school in Poland, had only basic vocational qualifications as a baker of cakes and pastries, as a cleaner and kitchen hand. (The tender included information regarding her earnings prior to leaving Katherine). The respondent also placed before the Court industrial awards for each of South Australia and the Northern Territory relating to employment broadly of the type in which the appellant had been engaged. No other material was put in evidence. In particular, the appellant gave none on that occasion.

Counsel for the respondent in the course of address to his Worship submitted that although the appellant was partially incapacitated she "could work full time at least as a kitchen hand and that the full time award for a kitchen hand is in excess of her amount that she would otherwise be entitled to" and thus not entitled to any award for weekly compensation. (It seems he used the phrase "partially incapacitated" in the physical rather than the economic sense). Alternatively, the only such compensation to which she was entitled would be any that fell during the first six months following the date in which she was found to have been partially incapacitated, which commenced from her visit to Dr Kreminski on 6 April 1992. That period would expire in about November 1992 during which period there was no evidence of employment and for about three months the appellant was at the rehabilitation centre. The submission proceeded that once that period had lapsed the appellant would have at least been able to do about five hours work as a kitchen hand and if that were so, then the amount that she was entitled to receive would come to more than the amount of her normal weekly earnings after the indexations provided for in s65(3), and thus her entitlement was nil. The absence of any evidence from the appellant was stressed as being an important factor, contrary to the interests of the appellant, going to her capacity to earn.

In his reasons published on 4 March 1996, his Worship said that the additional evidence was received to "bring the Court up to date", a somewhat

broader horizon than that with which he concluded his earlier reasons, that is, the question of level of compensation.

Grounds of appeal

It is his Worship's reasons for his decision or determination on that occasion which gave rise to the appeal, the grounds of which are:

The Learned Magistrate erred in law:

1. in that he failed to make any finding at all as to the level of partial incapacity for work as at March 1992 or thereafter although having earlier found that a partial incapacity for work did develop from March 1992;

2. in that he found that the words in s65(3) of the Work Health Act ("the Act"), "The date on which he first became entitled to compensation" meant (on the found facts) the date of the appellant's injury and not the date (March 1992) when her incapacity for work first developed:

3. in failing to find (as a consequence of the error disclosed in ground 2 above) that the date upon which the appellant became entitled to compensation was late March 1992 and that (as a further

consequence) the date on which her normal weekly earnings are to be assessed for the purposes of section 65(3) of the Act is immediately before late March 1992;

4. in failing to find that the appellant's earning capacity immediately prior to the date her partial incapacity developed (her normal weekly earnings) was at the rate dictated by the South Australian Award for Cleaners ($364.62 pw) or her last Northern Territory employment and that thereafter the only evidence of her level of partial capacity available, and which should have been accepted, would have been her capacity to work at the rate of 5 hours per day as a kitchen hand;

5. in failing to find that pursuant to the provisions of s64(1) of the Act the appellant was entitled to 26 weeks pay at the rate of $364.62 gross per week since, during that first 26 week period of partial incapacity, she was entitled to "the difference between what he (she) actually earned in employment during a week (nil) and his (her) normal weekly earnings";

6. in failing to find that subsequent to the first 26 weeks of partial incapacity the appellant's entitlement (pursuant to s65(3), read with s65(8) of the Act) and continuing until suspension or further order, was at the rate of $111.06 per week as adjusted by reference to

s65(3) of the Act and the indexation principles.

7. alternatively to 2, 3, 4, 5 & 6 above: in failing to find that the relevant date for the findings of an entitlement to compensation was the last date upon which the appellant was employed by the respondent subsequent to the date of injury.

His Worship's reasons

In his reasons of 4 March 1996 which appear to have been read from the Bench, his Worship recited the evidence of Dr Kreminski that the appellant, in the doctor's opinion, had never been fit for normal unrestricted duties as a cleaner until he had last seen her in September 1995, but that she could do part time light cleaning at her own pace for four or five hours a day. His Worship found that the date upon which the appellant first saw that doctor was April 1992. He also reviewed the evidence of Dr Schaeffer given on the latter occasion. At p8 of his reasons he found, in effect, that the appellant had no incapacity for work until 6 April 1992, although experiencing back pain. He said that both sides had agreed that the appropriate award to be applied was that for a kitchen hand, and assuming a capacity to work to a maximum of five hours per day five days a week upon the basis of that award, his Worship found a gross income of $241.22 would be paid. At p9 his Worship proceeded:

> "Now we will return to the evidence or lack of evidence of what has occurred since the period when she first went to Dr Kruminski (sic) in Adelaide .... There is no indication, as I indicate in my decision, that she was not incapacitated for work prior to going to Mr Kruminski (sic), and after her advent to Adelaide, a small period of time in February - perhaps March."

(The triple negative presents difficulties, but taking into account what his Worship had found in the course of his first set of reasons, I take it that what he meant to say was that the appellant was not incapacitated for work prior to going to see Dr Kreminski). He continued:

> "She did make applications for work in hotels, in restaurants, but finally found herself under Dr Kruminski (sic) and then directed to Alfreda. From that point on there is no evidence that if in fact she was not employed, there is no evidence that this was due to her incapacity. There's no evidence that if there was no employment that the failure to obtain it was due to any incapacity".

His Worship went on:

> "We have a void which was attempted to be filled by Dr Kruminski (sic), evidence by video and his report, but that does not establish the required degree - I am satisfied - which onus being on Mrs Rozycki that the opportunity was there".

Just what opportunity his Worship was referring to is unclear, but I consider that taking it all in context he meant that, notwithstanding the efforts to fill the void through the evidence of Dr Kreminski, there was no evidence from the appellant that her failure to obtain employment after March 1992 was due to any incapacity for work.

His Worship's findings as to partial incapacity for work were based upon evidence which was concluded prior to 20 March 1995 and embodied in his reasons of that date. Although he does not appear to have expressly so found, I think it can be gauged by implication that his Worship was not satisfied that there had been any relevant change in the appellant's condition which would cause him to modify or reverse the finding he made in March 1995 at the conclusion of the taking of the evidence in September of that year. The parties in written submissions as to the appropriate awards of compensation to be made take out their calculations to that latter date. Both parties appear to have proceeded upon the basis that the finding of partial incapacity made in March was not disturbed by the further evidence heard in September; partial incapacity continued. Plainly, his Worship had not endeavoured to quantify the degree of incapacity by reference to the amount which the appellant was reasonably capable of earning in a week within the meaning of s65(2)(b). No where does his Worship specifically refer to this question in his reasons of 4 March 1996. (There is a remarkable falling away in the standards of the reasons on the second occasion compared with the first). Having noted that Mrs Rozycki gave no evidence on the second occasion, his Worship said at p6 of his reasons (p16AB): "So that ended the evidence that was called to fit (sic - fill) in the gaps between decision and the time of presentation of further evidence concerning calculations of economic loss or loss of earning capacity, and evidence concerning reasonable capacity to earn. Dr Schaeffer was

called". His Worship went on to give a summary of Dr Schaeffer's evidence, based on a report after the decision in March 1995, that Mrs Rozycki was capable of working 40 hours a week continuously in the work to which she was accustomed. Counsel for the respondent submitted that the evidence of Dr Schaeffer should be accepted.

Nowhere does it appear that his Worship expressly found the degree of partial incapacity. The first ground of appeal goes to that failure. It is implicit that his Worship did not resile from his earlier findings. If he had accepted the evidence of Dr Schaeffer, or rejected the other evidence on this point, then the matter would have been resolved by a finding that, notwithstanding the injury, the appellant was not partially incapacitated for work as a result of it. His Worship proceeded instead to consider whether or not she was entitled to weekly compensation, a question which could only arise if she was incapacitated for work as a result of the injury. There is no express finding that she was capable of working any particular number of hours or earning any particular remuneration, but again, implicitly, his Worship must have considered that he could rely upon the evidence in the appellant's favour. The basis of rejecting the submissions of the appellant going to the quantum of weekly compensation was not that the submissions were based upon a false premise (that is, that the appellant was partially incapacitated) but that, by reason of the operations of the Act, the appellant was not entitled to any weekly compensation. The respondent's case was that

the appellant was not incapacitated for work by the injury at all. The appellant's case, based upon her work experience at the Hyatt Hotel and Dr Kreminski's opinion, was that she was partially incapacitated for work, being able to work up to five hours per day five days per week. There was evidence which his Worship could accept in that regard, and I consider that he implicitly did so.

If I be wrong in my conclusion that it can be discerned that his Worship implicitly made a finding as to the amount that the appellant was from time to time reasonably capable of earning in a week within the meaning of s65(2)(b), then I think it would be open to make such a finding on the evidence under this Court's power to vary the decision or determination appealed against (s116(2)). The word is of wide import and no doubt takes its meaning from the context in which it appears. Here, it is used in a provision giving jurisdiction to this Court on appeal, and there is no reason to think that it was intended that this Court should have anything less than the plenitude of powers which the word can legitimately embrace in disposing of the appeals. It includes power to change the decision or determination in part, whether by way of addition or by excision, modification or by substitution, qualification or otherwise re *The Queen v Tonkin & Another; Ex parte Federated Ship Painters' & Dockers' Union of Australia* (1954) 92 CLR 526, at 528, and see also *The Queen v Industrial Court; Ex parte Mount Gunston Mines Pty Ltd* (1982) 30 SASR 504 at 512 per Mitchell J. with whom King CJ. and White J.

agreed. That must be so, in the interests of justice, if there is no power to remit any question arising on appeal to the Court. There is no express power in s116(2) to do that.

Grounds 2, 3 and 4

These grounds may be conveniently be dealt with together. It will be recalled that the appellant's employment history in Katherine commenced with the respondent where she was paid $180 a week for part time work. Before departing Katherine she had engaged in similar work for other employers earning up to $380 a week; that in which she had last engaged prior to the move was with Sterling Private Cleaning Service at $250 a week after tax, estimated at between $25 and $30 a week. The question is, which amount, if any, should be selected as being the appellant's normal weekly earnings for the purposes of applying the formulas in ss64(1) and 65(3).

What was the appellant's normal weekly earnings for the purposes of s64(1)?

This issue seems to have been ignored by his Worship, although the question here is not the same as that which arises in the context of normal weekly earnings for the purposes of s65(3). The appellant was partially incapacitated for work as a result of the injury. She is entitled to be paid compensation equal to the difference between what she actually earned in employment during a week, and her normal weekly earnings, in respect of any

period during which the total period, or aggregate of the periods of her partial incapacity arising out of the same injury does not exceed 26 weeks. As to normal weekly earnings, see the definition in s49(a). It relates to what was the case, rather than what might have been. The other factor in the formula is what amount was actually earned in the relevant period of 26 weeks.

There is no evidence of her having been employed during any of the 26 weeks after the date upon which she was found to have been partially incapacitated for work. She is thus entitled to compensation for a period of 26 weeks at her normal weekly earnings. In this connection there is no temporal restraint amongst the factors to be taken into account in fixing an amount for normal weekly earnings. Details of her work history have been summarised above, but dealt with in greater particularity by his Worship in his original reasons commencing at p7 (p115 of the Appeal Book). She had been employed by the last employer in Katherine for five hours a day for a period from 22 October 1991 to 18 February 1992. She had been able to earn on occasions less, and on others more, than that sum and it becomes a matter of judgment as to what figure should be chosen as representing her normal weekly earnings. The period of engagement with the last employer in Katherine was for a significant enough period of time, and the job she was doing and the hours during which she worked were such not to render her normal weekly earnings during that period abnormal. That factor, together with the fact that it was a period more proximate to the time at which she became incapacitated for work

than the other periods of employment, supports the view I take that what she then earned can be properly regarded as normal weekly earnings for these purposes. Under this head the appellant was entitled to a determination in her favour for payment of compensation of $7,150.

What was the date on which the appellant "first became entitled to compensation" with the meaning of s65(3)?

That provision is to be found in Part V of the Act to do with compensation and rehabilitation. It is provided in s53 that subject to Part V, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his:

(a) death;

(b) impairment;

or (c) incapacity, there is payable by his employer to the worker or the worker's dependents in accordance with that Part, such compensation as is prescribed. By definition "injury" means a physical or mental injury arising out of or in the course of the worker's employment; "incapacity" is defined to mean an inability or limited ability to undertake paid work because of an injury; "compensation" means a benefit or an amount paid or payable under the Act as a result of an injury to a worker, and includes certain payments which are not relevant here (s3). Division 3 of Part V deals with "Amount of Compensation". It is subdivided into five parts, "A" relating to death benefits, "B" relating to total incapacity and loss of earning capacity, "C" for

permanent impairment (a reference to the subdivision is missing from the heading to subdivision “C” in the body of the Act, but referred to in the table of provisions), “D” relating to medical, surgical and rehabilitation treatment and “E” providing for the commutation of certain entitlements. Subdivisions A, B and C respectively directly reflect the result of an injury upon a worker as described in subparagraphs (a), (b) and (c) of s53, that is, death, impairment or incapacity. Subdivision D is an overall provision for what is called compensation, but which in reality provides for the payment by the employer or reimbursement to the worker of medical, surgical and rehabilitation expenses which are reasonably incurred as the result of an injury. Subdivision E is a special provision relating to commutation of regular payments under subdivision B. The design of the Act is to prescribe the results of an injury which are compensable and then to provide for the compensation or benefit which is payable depending upon the result. Sections 64 and 65, which are the principal provisions providing for compensation arising from total or partial incapacity for work, provide that that compensation is payable in addition to any other compensation to which a worker is entitled under Part V. That would tend to indicate that the word “compensation” when used in those sections is related to the compensation payable under them and not otherwise. Subsections (2) and (3) of s65 must necessarily be read together since the formula for establishing loss of earning capacity depends partly upon the worker’s normal weekly earnings (2), and normal weekly earnings are defined in (3); those two subsections are subject to the opening words of subs(2)

which limit their application to s65. The appellant contends that the word "compensation" is limited in its meaning to the compensation payable under subdivision B. The respondent says that it means whatever compensation a worker may be entitled to receive under the Act. In my opinion, to read the word "compensation" as contended for by the respondent would be to distort the purpose of s65, a specific form of compensation which may or may not be payable as a result of an injury; it does not come into play until incapacity arises. Sections 64 and 65 have no work to do unless the worker is totally or partially incapacitated for work as a result of an injury and they only come into operation when such an event occurs. Clearly, as many cases show, incapacity can arise as a result of an injury either immediately upon the injury being suffered or at any time thereafter, and the degree of incapacity may vary from time to time either becoming progressively worse or progressively better and sometimes varying from time to time. It is that result which must be the primary consideration. It is the incapacity to earn wages occasioned by the injury not the accident or the nature or extent of the injury which is the material factor in determining the amount of compensation under this subdivision. I would be content to leave my consideration of this question at this point were it not for some remarks made by Mildren J. in the course of his reasons for decision in the matter of *Loizos v Carton and United Breweries Ltd* (1993-94) 94 NTR 31 in the Court of Appeal. At p40 and following his Honour drew attention to the lack of clarity in the Act in the use of the expression "normal weekly earnings" and in so doing drew attention to the

definition of those words in s49. The definition falls into four alternative parts, any one of which could be applied depending upon the circumstances of the case. In the first three parts there is to be included in the calculation of normal weekly earnings the worker's remuneration for his or her normal weekly number of hours of work calculated at his or her ordinary time rate of pay. There is nothing in those parts of the definition which would cause me to change my view. However, his Honour pointed out that in subpar(d) it is provided that in circumstances where, by reason of the shortness of time during which the worker has been in the employment of his employer, it is impracticable at the date of the relevant injury to calculate the rate or relevant remuneration, or (subject to certain provisos) the worker is remunerated in whole or in part other than by reference to the number of hours worked, then the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he was engaged in paid employment is to be taken to be the normal weekly earnings. In my opinion, those provisions are self contained and address the special circumstances upon which they are based and have no application to the other definitions nor any effect upon the interpretation of the word "compensation" in subs(3) of s65.

In the definition of "normal weekly number of hours of work", there is a similar provision designed to meet special circumstances falling outside what might be regarded as the ordinary application of the definition. In each case

what is provided for is a special formula for the calculation of normal weekly earnings arising from the particular circumstances posited in those parts of the definition. They have no wider application. Accordingly, in my view, the normal weekly earnings of the applicant for the purpose of calculating her loss of earning capacity, is to be taken as her normal weekly earnings immediately before the date upon which she first became entitled to compensation for incapacity under s65. As to "immediately before", in *Loizos v Carlton United Breweries Ltd* Kearney J. at p35 said that those words encompassed: "... at most some reasonably short period of time immediately preceding "the date on which he first became entitled to compensation"", and Angel J. at p36 expressly agreed. Mildren J. does not appear to come to a concluded view.

The employment of the appellant by Sterling Cleaning Services was within a reasonably short period of time preceding the date on which she first became entitled to compensation under s65(3). The evidence is that she was paid about $275 per week before tax, and that is the amount which should be included as "normal weekly earnings" for the purposes of the formula in s65(3). It is not disputed that under the South Australian award her earning capacity as a skilled kitchen hand able to work five hours a day seven days a week would produce a weekly income of $241.22. The appellant was entitled to be paid compensation under s65(1) of the Act, up to 4 March 1996, for partial incapacity for work subsequent to the first 26 weeks of such incapacity,

the difference between her normal weekly earnings of $275 per week indexed in accordance with s65(3) and $241.22.

Onus of proof

This question arose incidentally in the course of argument, but particularly bearing in mind the failure of the appellant to give evidence upon the resumed hearing.

The Court of Appeal in *Crestwood Phoenix Darwin Pty Ltd & The Nominal Insurer v Savasti Kamarakis*, *ibid*, at pp23-24 said:

> "As to the onus of proof in matters to do with total and partial incapacity, there is no reason to depart from what was said by Jordan CJ. in *Bryer v Metropolitan Water, Sewerage and Drainage Board* (1939) 39 SR (NSW) 321 in the following passage at p331:
>
> > "The burden of proof lies upon the worker to establish (1) that he has received [an injury], and (2) that as a result he has sustained some incapacity for work ...: *Joy v Morton* (1922) 15 BWCC 33; *Jones v A & E Pettifer Ltd* (1929) 22 BWCC 405. When the worker establishes this, he is *prima facie* entitled to the compensation provided for by s9: *Moore v Barkey* [1923] AC 790 at 795; *McCann v Scottish Co-operative Laundry* [1936] 1 All ER 475 ... unless it appears that the incapacity is partial only, and that it is necessary to limit the weekly payments in the manner provided for by s11. The burden of proving that the incapacity established by the worker is partial only, and if so, of proving the other facts necessary to involve a limitation of payments under s11 is upon the employer: *Proctor & Son v Robinson* [1911] 1 KB 1004 (CA); *Cardiff Corporation v Hall* [1911] 1 KB 1009 (CA). This burden may be discharged by material elicited from the worker or his witnesses or by evidence called on behalf of the employer. But it is for the employer to supply the necessary material to the extent to which it may not be supplied by the evidence given

on behalf of the worker. When the employer desires to invoke the provisions of s11, he may take the line of endeavouring to establish that the worker is able to earn his full pre-injury average weekly wages; or he may endeavour to establish the worker's ability to earn some lesser average sum, so as to confine the amount of the compensation within two definite limits. If he chooses the former alternative, and fails because the Commission is not satisfied that the worker can earn full pre-injury average but infers that his average would be somewhat less, the employer cannot complain if the Commission then proceeds, as best it can, to perform the statutory duty imposed on it by s11. He certainly cannot complain if the Commission proceeds in the absence of any sworn evidence of definite amounts. It was for him to supply such evidence if it was available; and if it was impossible for him to obtain it, he has no ground for complaint if the Commission in its absence does the best it can with material at its disposal, including its general and local knowledge, to give him the benefit of the limitation provided for by s11": *Cardiff Corporation v Hall* [1911] 1 KB 1009 at 1016; *Roberts & Ruthven Ltd v Hall* (1912) 5 BWCC 331 at 334.

See also *Aitken v Goodyear Tyre & Rubber Co (Aust) Ltd* (1945) 46 SR (NSW) 20; *Connelly v J & A Brown & Abermain Seaham Collieries Ltd* [1946] WCR 58.

(Section 11 of the then New South Wales Act was that entitling the worker to weekly payments in the case of partial incapacity.). See also *Northern Cement Pty Ltd v Ioasa*, Martin CJ., unreported 17 June 1994."

Construction of the Act

I have born in mind that in legislation of this sort where ambiguity or difficulty arise a construction most favourable to the worker should be adopted, see *Foresight Pty Ltd (trading as Bridgestone Tyre Services) v Maddick* (1991) 79 NTR 17 at 24 per Mildren J. and per Kearney J. in *Loizos v Carlton and United Breweries* ibid/supra at p33.

Orders

Given the decisions and determinations which have been affected by the rulings on the appeal, the appellant should produce a draft of the orders sought, provide a copy to the solicitors for the respondent, and then make arrangements for the matter to be brought back before me to have the orders settled.
